No. 76-1686



# In the Supreme Court of the United States

OCTOBER TERM, 1977

---

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, MARINE DIVISION, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD, ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

---

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

---

WADE H. MCCREE, JR.,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

JOHN S. IRVING,
*General Counsel,*

JOHN E. HIGGINS, JR.,
*Deputy General Counsel,*

CARL L. TAYLOR,
*Associate General Counsel,*

NORTON J. COME,
*Deputy Associate General Counsel,*

ELINOR HADLEY STILLMAN,
*Attorney,*
*National Labor Relations Board,*
*Washington, D.C. 20570.*

## INDEX



### CITATIONS

Cases:

# In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1686

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, MARINE DIVISION, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 539 F. 2d 554. The decision and order of the National Labor Relations Board (Pet. App. 19a-75a) are reported at 219 NLRB 26.

### JURISDICTION

The judgment of the court of appeals was entered on October 19, 1976 (Pet. App. 15a-16a). A petition for rehearing was denied on February 3, 1977 (Pet. App. 17a). On April 25, 1977, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including June 1, 1977. The petition was filed on May 27, 1977.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether, in the circumstances of this case, the Board properly concluded that the union restrained and coerced the employers in the selection of their representatives for the purpose of grievance adjustment by picketing the employers' ships in order to force the employers to replace those representatives with members of the union, to recognize the union as the collective bargaining agent of those representatives, and to enter into a collective bargaining agreement or other contractual arrangements with the union.

## STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth at Pet. 3-4.

## STATEMENT

### A. The Board's Findings of Fact

The International Organization of Masters, Mates and Pilots, Marine Division, International Longshoremen's Association, AFL-CIO ("MMP"), petitioner in this case, is a union which represents both licensed deck officers on oceangoing vessels and smaller inland vessels and between 200 and 250 unlicensed, rank-and-file employees on inland vessels (Pet. App. 35a-37a).[1]

[1]The petition does not contest the Board's finding (Pet. App. 67a-68a) that MMP, and not just its Offshore Division, was responsible for the picketing at issue in this case. The Offshore Division is composed of some six thousand licensed deck officers on oceangoing vessels (Pet. App. 37a).



For many years, another labor organization—the Marine Engineers Beneficial Association ("MEBA")—has represented the licensed engineers on ships in the United States Merchant Marine (Pet. App. 38a). In the late 1950's and 1960's, MEBA, through its affiliate, the Associated Maritime Officers ("AMO"), began to compete with MMP by negotiating collective bargaining agreements under which MEBA supplied licensed deck officers as well as licensed engineers. The competition accelerated in 1970 when the United States government initiated a subsidy program to encourage the construction of new merchant ships. In the competition for bargaining agreements covering the licensed deck officers on the new ships, MEBA held an edge over MMP insofar as it offered to supply officers under a standard agreement which had a lower wage schedule and a lower manning scale—requiring a master and three mates rather than, as in the MMP agreement, a master and four mates (Pet. App. 38a-39a, 42a).

In 1971, the Aries Shipping Company was granted a government subsidy to build two ships, the M/V *Ultramar* and the M/V *Ultrasea* (Pet. App. 40a). Shortly after construction began, MMP President Thomas F. O'Callaghan approached Leo V. Berger, the president and principal stockholder of Aries, to warn him against entering into a MEBA contract for the ships (Pet. App. 43a-44a). In the summer of 1973, when construction of the *Ultramar* neared completion, O'Callaghan spoke with Berger to see if MMP was "going to be getting the contract" and followed this up with a letter urging the hiring of MMP officers and enclosing a copy of the standard MMP agreement (Pet. App. 44a-45a). Thomas W. Gleason, president of the International Longshoremen's Association ("ILA"), with which MMP is affiliated, also called Berger to insist on the manning of the *Ultramar* with MMP officers. When

Berger said someore else would be handling the crewing, Gleason threatened that "this cannot go on and I will tie up all the American ships if I have to * * *" (Pet. App. 46a n. 13).

On August 3, 1973, Aries contracted with Westchester Marine Shipping ("Westchester") to handle the crewing of Aries ships, including the *Ultramar* (Pet. App. 41a). When an MMP representative learned of this arrangement, the representative told Berger that "[w]e are going to harass the ship until you would be glad to sell it for scrap" (Pet. App. 48a). Westchester subsequently signed an agreement with MEBA covering all licensed deck officers and engineers on the *Ultramar* (Pet. App. 41a).

MMP officials decided to take "whatever action was necessary" to "protect our contracts"; and, on November 29, 1973, MMP members picketed the *Ultramar* carrying signs with the following message (Pet. App. 49a):

**S. S. ULTRAMAR**
**Works its Deck Officers Under**
**LOWER STANDARDS**
**than those worked under**
**by Deck Officers**
**REPRESENTED BY**
**MASTERS, MATES AND**
**PILOTS**
**MARINE DIVISION OF THE**
**INTERNATIONAL LONGSHOREMEN'S ASSOCIATION**
**AFL-CIO**

ILA President Gleason had received advance notification of the picketing, and the ILA honored the picket line (Pet. App. 63a-64a n. 22.)

The campaign against MEBA also focused on the M/V *Sugar Islander*, a ship constructed for the California and



Hawaiian Sugar Company (C & H) (Pet. App. 50a). MMP representatives wrote a C & H executive in November 1971, urging that C & H sign an MMP agreement covering the licensed deck officers on the vessel (Pet. App. 52a). Thereafter, in discussions taking place in 1972 and 1973 with an official of Matson Navigation Company, a C & H subsidiary, MMP representatives repeatedly brought up the matter, vowing that MMP "would take whatever steps were necessary to secure the manning of the *Sugar Islander*" (Pet. App. 53a). In August 1973, Pyramid Sugar Transport, Inc. ("Pyramid")—a company selected by C & H to operate the *Sugar Islander*—entered into a collective bargaining agreement with MEBA covering both licensed deck officers and engineers (Pet. App. 41a, 51a).

On September 26 and 27, 1973, MMP members picketed the *Sugar Islander* in the port of New Orleans carrying signs reading as follows (Pet. App. 53a):

**M/V SUGAR ISLANDER**
**UNFAIR TO THE**
**MASTERS, MATES AND PILOTS**
**MARINE DIVISION OF THE**
**INTERNATIONAL LONGSHOREMEN'S**
**ASSOCIATION, AFL-CIO**

MMP members picketed the ship again in other southern ports on January 2, 7, 25, and 26, 1974 (Pet. App. 54a). An action for an injunction against the picketing under Section 10(j) of the Act, 29 U.S.C. 160(j), was filed on February 15, 1974; and the parties subsequently stipulated that MMP would not picket the *Ultramar* or the *Sugar Islander* until final disposition by the Board of the underlying unfair labor practice charges (Pet. App. 54a n. 19).

The licensed deck officers serving on the *Ultramar* and the *Sugar Islander* have grievance-adjustment authority as representatives of their employers and have exercised

such authority in dealing with grievances of unlicensed personnel serving under them (Pet. App. 55a-57a).

**B. The Decisions Below**

The Board, in agreement with the Administrative Law Judge, found that the licensed deck officers aboard the *Ultramar* and *Sugar Islander* represented their employers in the adjustment of grievances, and that MMP had violated Section 8(b)(1)(B) of the Act by picketing the vessels with the object of causing the employers, Westchester and Pyramid, to replace their MEBA member licensed deck officers with licensed deck officers who belonged to and were represented by MMP (Pet. App. 25a, 71a). The Board further found that, since the "situation is such that picketing for recognition and/or a contract becomes almost indistinguishable from picketing for the removal or replacement of 8(b)(1)(B) representatives," MMP had also violated Section 8(b)(1)(B) by picketing for the objects of forcing the employers to recognize MMP as the collective bargaining representative of their licensed deck officers, forcing the employers to enter into a bargaining agreement with MMP covering such officers, or imposing the terms and conditions of an MMP agreement on the employers' licensed deck officers (Pet. App. 20a and n. 2, 21a). The Board ordered MMP to cease and desist from the unfair labor practices found and from "*in any other manner* restraining or coercing [Westchester and Pyramid] in the selection of their representatives for the purpose of the adjustment of grievances" (Pet. App. 25a-27a).[2]

[2]The Board found that the record reflected "that the *Ultrasea*, a sister of the *Ultramar*, was similarly picketed," (Pet. App. 25a) and it took notice of MMP picketing previously found unlawful in *International Organization of Masters, Mates and Pilots, et al.* v. *National Labor Relations Board (Marine & Marketing International Corp.)*, 486 F. 2d 1271 (C.A.D.C.), certiorari denied, 416 U.S. 956 (hereafter *Marine and Marketing*).



The court of appeals affirmed the Board's findings and conclusions and enforced its order (Pet. App. 1a-14a). The court observed that picketing with the object of replacing MEBA licensed deck officers with MMP members "was, without question, within the language of section 8(b)(1)(B)" (Pet. App. 9a), and it rejected MMP's contention that Section 8(b)(1)(B) should nevertheless be held inapplicable because the picketing did not specifically concern the performance of the grievance-adjustment function. The court noted that MMP's contention would destroy "the symmetry" of the Act, under which a labor organization receives the protection of Section 8(a) of the Act and incurs the prohibitions of Section 8(b)—including the prohibition against restraining the employer's right "to designate as its representatives for the adjustment of grievances those persons whom it pleases," whether or not their "grievance-adjusting abilities" figure in its selection (Pet. App. 10a).

The court also rejected the contention that the Board's decision was inconsistent with this Court's decision in *Florida Power & Light Co.* v. *International Brotherhood of Electrical Workers, Local 641*, 417 U.S. 790. It distinguished *Florida Power* on the ground, *inter alia*, that the union disciplinary proceeding there "amounted to indirect coercion of the employer at best," whereas here union coercion was "applied directly to the employer" (Pet. App. 11a-12a).

Finally, the court upheld the portions of the Board's order prohibiting picketing for the objectives of forcing recognition and/or the imposition of contract terms respecting the licensed deck officers. It agreed with the Board that "the practical effect of seeking these other objects is * * * tantamount to coercion of the employers in the selection of their licensed deck officers" (Pet. App. 12a-13a). Recognizing MMP as the representative of their licensed

deck officers or entering into an MMP contract covering such officers would, the court observed, put the employers in breach of their agreements with MEBA, under which the MEBA deck officers were supplied, and unnecessarily restrict "the class of individuals available as licensed deck officers to members of [MMP] and no others" (Pet. App. 13a).

## ARGUMENT

1. Petitioner contends that its picketing should be held exempt from the sweep of Section 8(b)(1)(B) because it was conducted by and on behalf of supervisors seeking to secure the jobs of the employers' Section 8(b)(1)(B) representatives, rather than on behalf of a union "attempting to control an employer's collective bargaining and grievance-adjustment policies" (Pet. 13).

Section 8(b)(1)(B) of the Act provides that "it shall be an unfair labor practice for a labor organization or its agents—* * * to restrain or coerce * * * an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." Petitioner does not here dispute the Board's findings that, since its membership includes some statutory employees (*supra*, p. 2), it is a labor organization within the meaning of Section 2(5) of the Act, 29 U.S.C. 152(5), and that the deck officers concerned were representatives of the employers for the purpose of the adjustment of grievances. Moreover, it concedes that replacement of MEBA deck officers was an objective of its picketing (Pet. 7). Accordingly, the court of appeals correctly observed that, insofar as MMP picketed the *Ultramar* and the *Sugar Islander* with the object of replacing "the MEBA-represented deck officers with its own members," the picketing "was, without question, within the language of section 8(b)(1)(B)" (Pet. App. 9a). In so concluding, the court below simply followed a long line of cases holding that a



labor organization violates Section 8(b)(1)(B) of the Act when it strikes, pickets, or engages in other coercive conduct in order to induce an employer to select bargaining or grievance adjustment representatives whom it does not want, or to forego representation by representatives of its own choosing.[3]

The decision below is in accord with the legislative history of the Act,[4] which indicates that Congress intended to accord the employer an unfettered right to select his representatives for grievance adjustment and collective bargaining. Picketing by a labor organization to force the replacement of such representatives abridges that right whether the labor organization is motivated by dissatisfaction with the manner in which the representatives perform those functions, or, as here, by a desire to find

---

[3]See, *e.g.*, *Laborers' International Union Local 478 (International Builders of Florida, Inc.)*, 204 NLRB 357, enforced, 503 F. 2d 192 (C.A.D.C.) (union's attempt to force employer to hire an extra foreman to serve as a "buffer" between employees and allegedly racist foremen); *Plumbers and Steamfitters Local Union No. 100*, 188 NLRB 951, 953-954, enforced *per curiam*, 491 F. 2d 1104 (C.A. 5) (threat to refuse to refer workers from hiring hall unless employer replaced its general foreman with a member of the local); *International Typographical Union, Local 38 (Haverhill Gazette Co.)*, 123 NLRB 806, 827, enforced, 278 F. 2d 6, 11-13 (C.A. 1), affirmed by an equally divided Court on this issue, 365 U.S. 705, 707 (strike to compel employer to agree to contract clause requiring foremen to be union members); *International Typographical Union (American Newspaper Publishers Assn.)*, 86 NLRB 951, 957, enforced, *American Newspaper Publishers Ass'n.* v. *National Labor Relations Board*, 193 F. 2d 782, 805 (C.A. 7), certiorari denied, 344 U.S. 812 (threat to strike to compel employers to agree that all foremen would be union members); *Los Angeles Cloak Joint Board (Helen Rose Co., Inc.)*, 127 NLRB 1543 (picketing to force employer to replace its industrial relations consultant).

[4]The pertinent history is set forth in *Florida Power & Light Co.* v. *International Brotherhood of Electrical Workers, Local 641*, *supra*, 417 U.S. at 803-804.

jobs for its members. Accordingly, the court below, following the decision of the Court of Appeals for the District of Columbia Circuit in *Marine & Marketing, supra*, which involved a similar fact situation, properly concluded that MMP violated Section 8(b)(1)(B) by picketing to force the employers to replace the MEBA-represented deck officers.[5]

2. This conclusion is not inconsistent with this Court's decision in *Florida Power & Light Co.* v. *International Brotherhood of Electrical Workers, Local 641, supra*. There, the Court held only that a union did not violate Section 8(b)(1)(B) of the Act by imposing fines on supervisor-members who crossed the union's picket line to perform rank-and-file work during a strike. In reviewing the decisions construing Section 8(b)(1)(B), this Court expressly approved and distinguished those decisions finding a violation of that section where unions had exerted direct pressure on employers respecting their selection of representatives for the purposes of collective bargaining or the adjustment of grievances, including cases in which the union sought the selection of its own members for positions which included grievance adjustment responsibilities. 417 U.S. at 798-799. In those "direct pressure" cases, as in the present case, the unions were attempting "to dictate to employers who would represent them in collective bargaining and grievance adjustment" (417 U.S. at 803), thereby coming within Section

[5]This conclusion does not ignore the fact that the Act embodies "a *laissez faire* policy toward concerted activities by supervisors" (Pet. 19). Since MMP has not chosen to divest itself of its employee membership, it is, as the court below pointed out, properly held accountable as a "labor organization" for violations of Section 8(b) of the Act, just as it is accorded the protection of Section 8(a) by virtue of that status (Pet. App. 10a). Accord: *Marine & Marketing, supra*, 486 F. 2d at 1274.



8(b(1)(B)'s literal terms. Indeed, this Court denied a petition for certiorari in *Marine & Marketing, supra*, which presented a question virtually identical to that in the instant case, while *Florida Power* was pending before the Court and even though a conflict with that decision was asserted.

By the same token, this Court would not, as petitioner suggests (Pet. 17), be aided in its consideration of *American Broadcasting Companies, Inc.* v. *National Labor Relations Board*, 547 F. 2d 159 (C.A. 2), certiorari granted, April 25, 1977 (Nos. 76-1121, 76-1153, 76-1162), by hearing it together with the present case. *American Broadcasting* concerns the imposition of union fines on supervisors who cross a picket line to do supervisory work; although distinguishable from *Florida Power*, it does not involve coercion aimed directly at an employer, as does the union action here.[6]

[6]Contrary to petitioner's contention (Pet. 15 n. 6), the issue in this case is not "analogous to that which the Court decided in *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 376-377 (1969)." In *Jacksonville Terminal*, this Court held that state court jurisdiction over picketing in a railway dispute was not preempted by the primary jurisdiction of the National Labor Relations Board, even though a small percentage of the union's membership consisted of non-railway employees who were not subject to the Railway Labor Act and might have been subject to the National Labor Relations Act (394 U.S. at 375-376). A contrary holding, the Court observed, might raise "a serious question" whether the parties to railway disputes would ever be "obligated to pursue the Railway Labor Act's procedures, and whether the Mediation and Adjustment Boards could ever concern themselves with a dispute—until the matter had first been submitted to the NLRB and that agency had determined that it lacked jurisdiction" (394 U.S. at 376). The present case, of course, does not involve preemption principles; and, more significantly, the Board's assertion of jurisdiction over MMP does not threaten to usurp procedures incorporated in another labor statute.

3. Petitioner contends that the portions of the Board's order prohibiting MMP from picketing the employers' ships for certain objects in addition to replacement of the licensed deck officers with MMP members reflect an interpretation of Section 8(b)(1)(B), "truly startling in its ramifications," which would make it "virtually impossible" for MMP or "any other union which represents or seeks to represent supervisors" to function as a union (Pet. 18-19). This contention overlooks the special circumstances which led the Board to conclude that such an order was necessary in this case to protect the employers from continuing coercion with respect to their selection of Section 8(b)(1)(B) representatives.

As petitioner concedes (Pet. 4-6), the picketing here took place in the context of MMP's long-term struggle against MEBA, which represented the licensed deck officers and negotiated the collective bargaining agreements of the picketed ships. Since collective agreements in this industry typically provide that the employer will hire only members of the contracting union (Pet. 6), the employers would have been required to replace all the MEBA officers if MMP had succeeded in obtaining a contract covering the licensed deck officers on these vessels. In short, the Board properly found that "[t]he situation is such that picketing for recognition and/or a contract becomes almost indistinguishable from picketing for the removal or replacement of 8(b)(1)(B) representatives" (Pet. App. 20a n. 2). In addition, as the Board noted (Pet. App. 23a-24a), MMP's picketing for any or all of the proscribed objects would coerce the employers in the selection of their Section 8(b)(1)(B) representatives by warning them not to select any persons except those who would work on MMP's terms. As the court below concluded (Pet. App. 13a), the "probable and foreseeable result" would be to restrict "the class of individuals available as licensed deck officers to members of [MMP] and no others."



Thus, contrary to petitioner's contention (Pet. 18), the decision here does not hold that a labor organization which represents both employees and supervisors "can *never* picket to compel an employer (1) to hire or retain one group of supervisors rather than another, (2) to recognize the union as bargaining representative for supervisory personnel, (3) to enter into a collective agreement governing supervisors, or (4) to adopt or implement certain terms and conditions of employment for supervisors." Picketing with respect to the positions of supervisors who do not possess grievance-adjustment or collective-bargaining authority would not violate Section 8(b)(1)(B). The holding in the present case does not preclude a union from, for example, picketing to urge higher wages for supervisors it already represents. In sum, the order here must be read in light of the facts of this particular case, and, so viewed, it is a proper exercise of the Board's remedial authority.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
*Solicitor General.*

JOHN S. IRVING,
*General Counsel,*

JOHN E. HIGGINS, JR.,
*Deputy General Counsel,*

CARL L. TAYLOR,
*Associate General Counsel,*

NORTON J. COME,
*Deputy Associate General Counsel,*

ELINOR HADLEY STILLMAN,
*Attorney,*
*National Labor Relations Board.*

AUGUST 1977.